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No. 94-249

IN THE SUPREME COURT
OF THE UNITED STATES
October Term 1994

JOHN S. ROWE,

Petitioner,

v.

H. CHRISTIAN DEBRUYN, *ET AL.*,

Respondents.

PETITIONER'S REPLY TO
RESPONDENTS' BRIEF IN OPPOSITION

October 28, 1994

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Petitioner Rowe respectfully replies to Respondents' Brief in Opposition [hereinafter *Opposition Brief*] filed by Respondents. [hereinafter Prison Officers].

ARGUMENT

1. This case raises the question presented and the petitioner has not waived his substantive due process claim.

The question presented is exactly the question decided by the Court of Appeals:

> [Rowe] maintains that the IDOC's policy deprived him of a "fundamental liberty," and that "no man should be wrongfully convicted to satisfy the security concerns of a governmental entity." Thus, Rowe is actually arguing against the state's ability to deprive him of his right to claim self-defense at all. Such a claim is most properly characterized as substantive due process.

Rowe v. DeBruyn, 17 F.3d 1047, 1050-51 (7th Cir. 1994). The Prison Officers' argument that the case does not raise a substantive due process claim and that Rowe has waived such a claim is not supported by the record and is itself waived.[1]

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[1]The Prison Officers raise this argument for the first time in the *Opposition Brief*. They did not present their waiver argument in any of the three (3) briefs they filed in the Court of Appeals.

2. The evidence construed most favorably to Rowe does not support The Prison Officers' *post hoc* justifications that Rowe used excessive force and that they considered the fact of self-defense as a mitigating factor.

This case was terminated on summary judgment. The evidence construed most favorably to Rowe shows that, in 1991, the Prison Officers recognized that Rowe was the victim of a brutal attack and attempted rape but convicted him because they denied him the right to raise the defense of self-defense. "[Rowe] did have a human right to protect himself, but the Department of Correction doesn't have an allowance for that." *Deposition of Watson* at 38.

The Prison Officers' *post hoc* arguments, raised for the first time during the course of this litigation, are inherently suspect and must be rejected. *N.L.R.B. v. Indianapolis Mack Sales and Srvc., Inc.*, 802 F.2d 280, 285 (7th Cir. 1986) ("[post hoc justifications] made after the initial decision and in support of the application for enforcement are inherently suspect and do not merit our consideration").

If the Prison Officers really believed, in 1991, that Rowe had used excessive force, they must have incorporated their findings and reasons in the record.[2] Yet, the Prison Officers' decision and finding was devoid

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[2]*See Wolff v. McDonnell*, 418 U.S. 539, 565 (1974) (the conduct adjustment boards shall create a record containing evidence upon which a prisoner is found guilty and the reasons for the imposition of a guilty finding); *Chavis v. Rowe*, 643 F.2d 1281, 1286 (7th Cir. 1981) (the prison conduct adjustment boards shall provide prisoners "with a written statement as to the evidence relied on and reasons for the disciplinary action"), *cert. denied sub nom. Boles v. Chavis*, 454 U.S. 907 (1981).

of any allegation that Rowe had used excessive force. Instead, they found Rowe guilty because "[t]here is no self-defense policy for offenders in I.D.O.C." (AAB-21).[3]

Under the foregoing circumstances, this Court cannot assume the truth of the Prison Officers' *post hoc* justifications-- or, at least, it cannot do so at this stage of the proceeding. *Garnack v. Continental Casualty Co.*, 977 F.2d 1143, 1145 (7th Cir. 1992) (at the summary judgement stage the court should construe all facts most favorably to nonmovant with all reasonable inferences drawn in nonmovant's favor).

3. The Prison Officers deprived Rowe of a protected liberty interest.[4]

The Prison Officers argue that one year after Rowe was sentenced, the threat that any part of Rowe's sentence would be imposed was eliminated. Even though Rowe's sentence was originally suspended, Rowe was later confined to a restrictive, disciplinary unit because a subsequent sentence imposed upon him was enhanced due to this conviction. (AAB-14). Thus, the suggestion, in the *Opposition Brief* at i, that Rowe received "no punishment" is simply incorrect.

In their summary judgment motion, the Prison Officers did not challenge the fact that Rowe's CAB conviction deprived him of a protected liberty interest. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (a

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[3]Citations to the Appendix in Rowe's Appellant Brief, filed in the Court of Appeals, are shown as "AAB-___."

[4]This point is presented in reply to the *Opposition Brief*. Rowe is not pursuing a procedural due process claim.

summary judgment "movant always bears the initial burden of informing the district court of the basis for its motion"). The district court reached this issue, *sua sponte*, and held Rowe was not deprived of a protected liberty interest. (a-29).[5] The Court of Appeals overruled: "In our view, Rowe's punishment, although suspended, constitutes 'consequences visited on the prisoner that are qualitatively different from the punishment characteristically suffered by a person convicted of crime.'" *Rowe*, 17 F.3d at 1053 (quoting *Vitek v. Jones*, 445 U.S. 480, 493 (1980)).

It was only after the Court of Appeals issued its opinion that, for the first time, the Prison Officers claimed Rowe had not sustained a loss of a protected liberty interest.[6] This argument is incorrect and is waived.

Finally, regardless of the status of the punishment imposed, Rowe is entitled to seek, *at least*, nominal and perhaps punitive damages, *Carey v. Piphus*, 435 U.S. 247, 266 (1978), and the expungement of his disciplinary records. *Ware v. Heyne*, 575 F.2d 593, 595 (7th Cir. 1978).

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[5]Citations to the Appendix in the Petition are shown as "a-____."

[6]*See* Appellees-Respondents' Petition for Rehearing filed in the Court of Appeals.

4. This petition presents an important and fundamental question of whether a prisoner being attacked and raped has a fundamental right, protected by the due process clause of the fourteenth amendment, to defend himself.

The Prison Officers recognize that self-defense is established in Jewish, Ancient Greek, and English traditions, but argue that it is "inimical to basic Christian principles. They quote Matthew 5:38-39, which rejects the principle of "an eye for an eye." The "eye for an eye" standard, however, is a principle of vengeance. Self-defense is a measure to prevent the loss of the first "eye."[7] Further, American law is derived not from the Christian principles, *see* U.S. Const. amend. I, but from English common law. Under English common law, self-defense is "the primary law of nature, so is not, neither can it be in fact, taken away by the law of society." 2 H. Broom, *Commentaries on the Laws of England with Notes by William Wait* 3 (1875) Moreover, all philosophies of peaceful non-resistance provide that such a course of conduct must be a personal moral choice and cannot be imposed by the state.

True, the *Universal Declaration of Human Rights* does not refer to "self-defense." It does, however, recognize that "[e]veryone has the right to life, liberty and security of person." *Universal Declaration of Human Rights* art. 3. But, without the right to defend

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[7]The Prison Officers' citation to Matthew 5:38-39 ("if anyone strikes you on the right cheek, turn to him the other also") is disingenuous. First, if this was the principle under which the prison were being operated, the Prison Officers had no reason to punish Rowe for striking his putative rapist-- or, for that matter, to punish his attacker. Second, being raped is a far cry from a slap on the cheek.

life, the rights to life, liberty, and security would be illusory.[8]

Self-defense is widely recognized by the states. The Prison Officers have not cited a single state in which self-defense is not recognized. In fact, their research discloses that at least 34 states recognize self-defense. The fact that there are variations to self-defense laws does not make the right any less fundamental.

Allowing prisoners to raise the defense of self-defense would not encourage prisoner-to-prisoner violence. However, "to forbid all resistance to all threats to life and bodily integrity is not to ensure a lack of violence . . ., but to leave the weak and the vulnerable the easy prey of the strong and the vicious." *Rowe*, 17 F.3d at 1055 (Ripple, J., dissenting). If prison authorities have to hold a hearing to convict a prisoner whom they claim battered another prisoner, they can, and must, equally hold a hearing to determine whether a claim of self-defense is legitimate. After all, the constitution requires very little to uphold the decision of prison conduct adjustment boards. *Superintendent v. Hill*, 472 U.S. 445, 455 (1985) ("some evidence" must support the decision).

The Prison Officers' argument that this Court should defer to their administrative discretion in balancing the state's penological interest viz-a-viz Rowe's right to defend himself is unpersuasive, because "deference to the administrative expertise and discretionary authority of correctional officials must be schooled, not absolute." *Campbell v. Miller*, 787 F.2d

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[8]The Prison Officers criticize Rowe's citation to Grimm, *Hansel and Gretel*, by arguing that life inside a maximum security prison is no fairy tale. That makes for good prose but little reason. *Hansel and Gretel* was cited for the proposition that self-defense is engraved into our culture and upbringing.

217, 227 n.17 (7th Cir. 1986). After all, federal courts must not "abdicate [their] constitutional responsibility to delineate and protect fundamental liberties." *Pell v. Procunier*, 417 U.S. 817, 827 (1974). Further, no governmental purpose which allows an innocent person, *albeit* a prisoner, to be convicted and punished in the name of security can ever be legitimate. A state can never legitimately require an individual to passively submit to forcible rape to advance its security concerns.

Finally, the great fallacy in the Prison Officers' brief is their claim that "[i]n prison, security personnel are almost always present or within shouting distance." *Opposition Brief* at 12.[9] The facts of this case demonstrate that this is simply not so. The record shows that as Evans tried to rape Rowe, Rowe repeatedly screamed for help, but no officer responded. (AAB-17 to -19). Eventually, another prisoner, Perez, heard Rowe's pleas for help and came to his rescue. Rowe and Perez together were able to eject Evans from Rowe's cell. *Id.* After ejecting Evans from his cell, Rowe sought out an officer and demanded action. "Officer Ray said, 'Well what do you want me do?'" *Id.* at 19. "Correctional Officer Robert Ray did not have a radio on, nor did he make any effort to investigate [Rowe's] pleas for help, nor did he ever offer [Rowe] assistance." *Id.*

Lack of protection by prison authorities is "a situation that, the cases of [the Seventh Circuit] make clear, occurs with some frequency." *Rowe*, 17 F.3d at 1055 (Ripple, J., dissenting). Moreover, just a few

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[9]The Prison Officers claim, *without* citation to the record, that "[t]he fight was broken up by guards and another inmate." *Opposition Brief* at 2. This assertion is absolutely untrue and unsupported by the record. Despite Rowe's pleas for help, *no* guard came to his assistance. (AAB-17 to -19)

months ago the Seventh Circuit, at the urging of Indiana correctional officers, upheld a jury instruction that prison officers are not constitutionally required to protect prisoners from prisoner-to-prisoner violence if it is not *easy* for them to do so. *Gibbs v. Franklin*, 18 F.3d 521 (7th Cir. 1994), *vacated and remanded*, ___ U.S. ___, 63 USLW 3291, 1994 WL 286921 (1994).

> It is indeed a novel proposition of constitutional law to hold that a state, having deprived a person of liberty according to law, can further punish that individual for attempting to stay alive, even when the state itself is not ready, willing, or capable of assuming that responsibility by substituting its own strong arm for that of the prisoner-victim.

Rowe, 17 F.3d at 1055-56 (Ripple, J., dissenting).

Because of the exceptional importance of the issue presented and its impact on the lives of prisoners and the conduct of prison administration, this Court should grant certiorari and, for the first time, hold that the right to self-defense is fundamental and extends to prisoners facing serious injury or death.

CONCLUSION

For the foregoing reasons, Petitioner John S. Rowe respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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